

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LARRY MARTIN,)	NO. 63590-5-I
)	
Appellant,)	DIVISION ONE
v.)	
)	
JEFFREY CONAN and JANETTE M.)	
CONAN, husband and wife and the)	UNPUBLISHED OPINION
marital community thereof; JEFF)	
CONAN TRANSPORT, INC., a British)	FILED: March 8, 2010
Columbia, Canada corporation,)	
)	
Respondents.)	
)	

Lau, J. — Larry Martin, a commercial truck driver, got out of his truck to pick up a wallet he saw in the road. When Jeffrey Conan passed Martin, the roofing trusses on his flatbed trailer knocked Martin over and Conan's trailer ran over Martin's legs. Martin sued Conan for negligence. The trial court granted Conan's motion for summary judgment. Viewing the evidence in the light most favorable to Martin, we conclude that the trial court did not err in granting Conan's motion for summary judgment because there is no evidence that Conan breached his duty to Martin and there are no material

issues of fact. We affirm.

FACTS

On the morning of March 16, 2005, Jeffrey Conan, a commercial truck driver, drove an oversized load of roofing trusses south on I-5. Conan's truck was clearly marked with "Oversized Load" signs. Conan pulled into the Bow Hill Scales weigh station at mile marker 235. After getting his trailer-tractor weighed, Conan drove around the semi-circle exit road to get back onto I-5.

Conan saw a truck on the side of the side of the road and its driver, Larry Martin, standing outside of his truck. Martin had pulled over to the side of the road because he thought he saw a wallet in the road. Martin saw Conan's truck coming toward him, but he did not know how far away it was. Conan kept Martin in his field of vision until he passed Martin.

Conan drove around Martin's truck. Conan estimated he was driving about five to eight miles per hour. As Conan's truck passed Martin, the trusses on Conan's trailer hit Martin, knocking him down and projecting his legs under the trailer. The trailer ran over Martin's legs. Conan looked in his side mirror to make sure his trailer would also clear Martin's truck and saw Martin lying in the middle of the road behind him. Conan stopped his truck and got out to help Martin.

Another truck driver, John Heaphy, was following Conan's truck and witnessed the accident. Heaphy stopped his truck, called 911, and got out of his truck to help Martin.

Trooper T. L. Nickelson arrived at the scene of the accident about half an hour later. Trooper Nickelson spoke to Conan and Heaphy, and both of them gave written statements about the accident.¹

Martin filed a complaint against Conan for negligence. Conan filed a motion for summary judgment, arguing that Martin's injuries were due solely to his own negligent behavior and that Conan had operated his tractor-trailer in compliance with all state regulations. The court granted Conan's motion for summary judgment.

Martin appeals.

DISCUSSION

Martin asserts that the trial court erred in granting Conan's motion for summary judgment because, viewing the evidence in the light most favorable to Martin, there is an inference that Conan's negligence proximately caused the accident.

In reviewing a summary judgment order, an appellate court engages in the same inquiry as the trial court. Wingert v. Yellow Freight Sys., Inc., 146 Wn.2d 841, 847, 50 P.3d 256 (2002). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "A material fact is of such a nature that it affects the outcome of the litigation." Ruff v. County of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). We consider the facts and inferences from the facts in the light most favorable to the nonmoving party. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). We will affirm an order of

¹ Martin had already been taken from the scene of the accident by ambulance.

summary judgment if reasonable persons could reach only one conclusion. Venwest Yachts, Inc. v. Schweickert, 142 Wn. App. 886, 893, 176 P.3d 577 (2008).

Martin first asserts that the trial court erred in disregarding the expert testimony of Wade Westphal. Martin retained Westphal as an expert in the area of commercial trucking. In his deposition, Westphal said that under RCW 46.61.245, Conan had a duty to exercise due care to avoid colliding with pedestrians.² Westphal said that Conan “had not kept his eye on the rear of his trailer and the over-width portion of the load to make sure he did not strike anything or anyone. This violated the standard of care.” Westphal also said, “Conan was not operating his tractor-trailer as far to the left as possible, which he had a duty to do in light of his uncertainty about the stopped vehicle and the pedestrian in the roadway. This is another breach of the standard of care that [led] to the accident and Plaintiff’s injuries and damages.” In sum, Westphal stated that Conan breached his duty to Martin by failing to watch in his mirror to make sure he did not strike Martin and by failing to drive his truck as far left as possible.

Contrary to Martin’s assertion, the trial court did consider Westphal’s testimony in deciding whether to grant Conan’s motion for summary judgment. The court asked Martin’s counsel whether there were any cases that were factually close to this one and counsel said, “We couldn’t find anything on point, Your Honor.” Report of Proceedings

² RCW 46.61.245 provides, “Notwithstanding the foregoing provisions of this chapter every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any obviously confused or incapacitated person upon a roadway.”

(RP) (Mar. 30, 2009) at 8. The court then asked whether there was support for the duty to go as far left as possible and counsel only cited Westphal's declaration.

In granting Conan's motion for summary judgment, the court said, "[I]t seems clear to me the facts are that Mr. Conan was checking mirrors as well as looking forward and driving, and he had all three to focus on." RP (Mar. 30, 2009) at 12–13. The court also stated, "Mr. Westphal's declaration as an expert does propose to me that there are duties different than those that I'm recognizing. I simply don't find those duties to exist under the law and under the facts of this case." RP (Mar. 30, 2009) at 14. The trial court also considered Heaphy's testimony. "There is nothing the driver of the flatbed with the trusses could have done differently to prevent the accident." Concluding that Westphal's declaration did not raise material issues of fact regarding whether Conan breached his duty to Martin, the court granted Conan's motion for summary judgment.

Reviewing the law and the record, we agree with the court below that there is no support for Martin's assertion that Conan had a duty to watch in his mirror to make sure he did not strike Martin or to drive his truck as far left as possible.

Martin also contends that the trial court erred in granting Conan's motion for summary judgment because there were genuine issues of material fact regarding how far away Conan's truck was when Martin entered the road and whether Martin was next to or beside his trailer when Conan passed him. Martin argues that the statements by Conan and Heaphy after the accident are inconsistent with their later declarations, creating material issues of fact.

When Trooper Craig Cardinal questioned Conan after the accident, he asked whether Martin was behind his vehicle when Conan drove by and Conan said, “No, he was at the side.” In his declaration, Conan stated that the last place he saw Martin was “standing behind his trailer.” Although the record is unclear whether Martin was behind his trailer or next to it, that does not create a material issue of fact.

Martin stated in his deposition that he saw a truck coming toward him, he did not know how far away it was, and he went out into the road to pick up the wallet. In his statement to Trooper Cardinal, Heaphy said, “[Martin] exited his truck to retrieve a wallet in the road. The flatbed truck was passing his position. The victim moved toward the truck as it was passing him and was struck by protruding lumber.” Based on this testimony, it is clear from the record that Martin was walking toward Conan’s truck while Conan was driving toward him. Martin asserts that a reasonable inference is that “Conan sped up after Martin took his eyes off him to fetch the wallet, to a speed beyond safe or anticipated on that road” Appellant’s Reply Br. at 4.

The record does not support this inference. Conan consistently stated that he was going five to eight miles per hour. In his declaration, Heaphy said, “At no time was the flat-bed truck speeding.” There is no evidence in the record that Conan sped up as he approached Martin. On the contrary, even in the light most favorable to Martin, the record supports the inference that Martin breached his duty as a pedestrian under RCW 46.61.240(1) to yield the right-of-way to Conan.³ Whether Martin was behind his

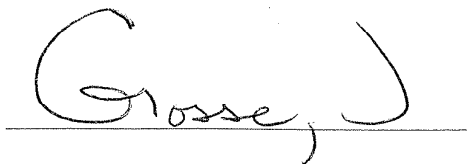
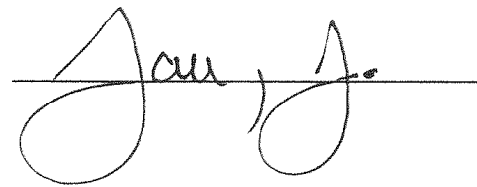
³ “Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.” RCW 46.61.240(1).

trailer or next to it when Conan approached him would not affect the outcome of the litigation and therefore is not a material issue of fact.

Finally, Martin contends that credibility issues should have precluded summary judgment in this case. Martin bases this argument on the inconsistencies in whether Martin was next to or behind his truck when Conan passed and the fact that Heaphy stated in his declaration that Martin bent down to pick up the wallet, but did not include that in his statement to Trooper Cardinal. “[C]redibility issues may preclude a summary judgment in appropriate circumstances but . . . such issues must be based on more than argument and inference on collateral matters.” Amend v. Bell, 89 Wn.2d 124, 129, 570 P.2d 138 (1977). The important fact, which none of the evidence contradicts, is that Martin was in the road when Conan’s trailer passed him, knocking him over. Whether Martin bent down to pick up the wallet before or after Conan passed him is a collateral matter and not an appropriate basis to reverse summary judgment in this case.

We affirm.

WE CONCUR:

Handwritten signature of Grosse, J. in cursive script, written over a horizontal line.Handwritten signature of Dwyer, A.C.J. in cursive script, written over a horizontal line.Handwritten signature of Dwyer, A.C.J. in cursive script, written over a horizontal line.